

COMMONWEALTH OF MASSACHUSETTS  
COURT OF APPEALS

SUFFOLK, ss.

Appeals Court No. 2017-P-1100

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BUFFALO-WATER 1, LLC,

Plaintiff-Appellant,

v.

FIDELITY REAL ESTATE COMPANY, LLC

Defendant-Appellee.

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ON APPEAL FROM THE SUPERIOR COURT FOR THE  
COMMONWEALTH OF MASSACHUSETTS

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**BRIEF OF THE APPELLANT**  
**BUFFALO-WATER 1, LLC**

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OCTOBER 26, 2017

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**ISSUES PRESENTED FOR REVIEW**

1. Did the Court commit an error of law by dismissing a declaratory judgment action where the Plaintiff alleged an actual case and controversy ?
2. Did the Court commit an error by imposing an “extremely high” fraud-like standard to invalidate a biased appraisal ?
3. Is the failure to disclose and the knowing concealment of a conflict by an appraiser sufficient to state a claim to declare an appraisal invalid ?
4. Did the Court commit an error of law by dismissing without any discussion Buffalo’s claim for breach of the covenant of good faith and fair dealing ?

**STATEMENT OF THE CASE**

On May 23, 2017, Buffalo Water 1, LLC (“Buffalo”) the current owner of 7 Water Street, Boston, Massachusetts (the “Property”), filed this declaratory judgment action against its tenant, Fidelity Real Estate Company LLC (“Fidelity”). (Record Appendix (“R.”) 7-178). Through the action, Buffalo sought to invalidate an appraisal of the Property completed by Cushman & Wakefield (“Cushman”),

which failed to disclose and affirmatively concealed its business relationship with Fidelity. (R. 8).

On June 8, 2017, Fidelity filed a motion to dismiss verified complaint for declaratory relief (the "Motion").<sup>1</sup> (R. 217-243). By its Motion Fidelity maintained that Cushman's concealment of its on-going business relationship with Fidelity is insufficient to invalidate the appraisal. (R. 235). Rather, Fidelity claimed that Buffalo was required but failed to allege sufficiently that the appraiser "engaged in the requisite fraud, corruption, dishonesty or bad faith," and therefore the complaint should be dismissed. (Id.)

On June 28, 2017, Buffalo opposed the Motion. (R. 244-258). Specifically, Buffalo claimed that it had alleged an actual case and controversy, and therefore dismissal of the declaratory judgment claim would be improper as a matter of law; and in any event, Buffalo had alleged sufficient facts to demonstrate an appearance of bias, actual bias and fraud and

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<sup>1</sup> With the Complaint, Buffalo filed an application for preliminary injunction to prevent a forced sale of the Property pending an adjudication of its claims to invalidate the appraisal. Fidelity and Buffalo agreed to a "stand still" pending the adjudication of Buffalo's claims.

therefore was entitled to a declaration that the biased appraisal was invalid. (Id.)

By Memorandum of Decision and Order on Defendant's Motion to Dismiss (the "Order") dated July 21, 2017, the Court (Sanders, J.) dismissed Buffalo's claims for declaratory relief and breach of the covenant of good faith and fair dealing. (R. 491-494). The Court concluded that "nondisclosure" and intentional concealment of a known conflict "does not amount to the kind of bad faith, fraud or corruption required for a court to invalidate" an appraisal. (R. 492-493). The Court adopted an "extremely high" standard to invalidate an appraisal based upon its inability to "locate any Massachusetts cases in which plaintiff has been successful in invalidating an appraisal<sup>2</sup>" and the parties' contractually expressed

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<sup>2</sup> The Court's conclusion is misleading and of no legal relevance. First, in State Room, Inc. v. MA-60 State Associates, L.L.C., 84 Mass.App.Ct. 244, 250 (2013), this Court identified at least two cases "voiding" components of appraisals. Cambridge Street Metal Company Inc. v. Carrao, 30 Mass.App.Ct. 150, 155 (1991) (voiding one component of appraiser's valuation of closely held stock as adjustment unauthorized by formula of governing stock purchase agreement an ordering remedial computation); and Alperin v. Eastern Smelting & Refining Corp., 32 Mass.App.Ct. 539, 545-550 (1992) (voiding unauthorized adjustments by appraising accounting firm in pricing formula set by contract governing sale of closely held stock shares).



"desire for finality." The Court recognized that the expressed desire of finality

would be undermined if a plaintiff was permitted to keep two strings in its bow -that is, move forward with the appraisal and then if dissatisfied with the result seek to overturn the appraisal with only vague allegations of bias.

(Id.)

#### **STATEMENT OF THE FACTS**

On or about October 14, 2004, Buffalo purchased the Property from Fidelity for \$15.5 million and, through a long-term "Net Lease" with Fidelity (the "Lease"), agreed to lease-back the Property to Fidelity. (R. 9, ¶ 6). In connection with the Lease, Buffalo granted Fidelity an option to purchase the Property (the "Option Agreement"). (R. 10, ¶ 8). Through the Option Agreement, Fidelity had the discretionary right to purchase the Property for:

The greater of (i) an amount equal to ninety-five (95%) of the fair market value of the Property **as of the Option Closing Date**...and Sixteen Million Two Hundred

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Second, there are no Massachusetts cases involving challenges (like Buffalo's) based upon bias. Third, there are only approximately 10 cases involving appraisals. Of these ten cases, only approximately six cases involve judicial review of the substance of an appraisal.

Seventy Five Thousand and 00/100  
Dollars (\$16,275,000.00).

(R. 10, ¶ 9).

The Option Agreement required that Fidelity and Buffalo either agree upon a fair market value or in the absence of agreement:

[T]he fair market value be determined by two appraisers, one of whom shall be appointed by [Buffalo] and one by [Fidelity] or a third to be selected if necessary as provided below...

If such two appraisers cannot agree unanimously on such value within thirty (30) days after their designation but the higher appraisal is no more than five percent (5%) greater than the lower appraisal, the fair market value shall be deemed to be the average of the two appraisers' individual appraisals. If the difference is greater than five percent (5%) a third appraiser shall be appointed...The third appraiser alone shall have thirty (30) days after his appointment to determine such fair market value except that the amount determined by the third appraiser shall not be greater than the higher or less than the lower of the other two appraisals.

(R. 10, 11, ¶ 9).

By Option Notice dated August 25, 2016, Fidelity exercised its right to purchase the Property. (R. 11,

¶ 10). Neither Fidelity nor Buffalo agreed upon the fair market value, both retained independent appraisers and both appraisers issued opinions of value the difference of which was greater than five percent. (R. 11, ¶ 11).

To resolve the fair market value, by engagement letter dated January 31, 2017, Fidelity and Buffalo agreed to retain Cushman to determine the "Fair Market Value" as that term is defined in the Option Agreement (the "Appraisal Agreement"). (R. 11, ¶ 13). The Appraisal Agreement identified the "Terms of Engagement" including:

**Conflicts of Interest**

C&W adheres to a strict internal conflict of interest policy. If we discover in the preparation of our appraisal a conflict with this assignment we reserve the right to withdraw from the assignment without penalty; and

\* \* \*

The appraisal prepared pursuant to this Engagement will be prepared in accordance with the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation, the Standards of Professional Practice and the Code of Ethics of the Appraisal Institute.

(R. 11, 12, ¶ 15). Ethical Rule 3-6 of the Code of Professional Ethics of the Appraisal Institute (the "Code") confirms that it is:

unethical to provide a Service [including an appraisal] if a valuer has any direct or indirect, current, or prospective personal interest in the subject or outcome of the Service or with respect to the parties involved in the Service, unless:

(a) prior to agreeing to provide the Service, the valuer considers the facts and reasonably concludes that he or she would remain unbiased and reasonable persons, under the same circumstances would reach the same conclusion;

(b) such personal interest is **disclosed** to the client prior to the valuer agreeing to provide the Service; and

(c) such personal interest is **disclosed** in each Report resulting from such service.

(R. 11, 12, ¶ 15).<sup>3</sup>

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<sup>3</sup> The required disclosure under the Code is similar to that required by the American Arbitration Association ("AAA"). Specifically

- o AAA Rule 17 captioned "Disclosure" requires "Any person appointed or to be appointed as an arbitrator" "disclose to the AAA any circumstances likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence" "or any past or present relationship with the parties or their representatives;"

Buffalo relied upon the representations in the Appraisal Agreement and retained Cushman. (R. 12, ¶ 16). Unbeknownst to Buffalo, Cushman solicited, was selected by and agreed to a national representation contract with Fidelity. (Id.). At no time before issuing the appraisal did Cushman disclose either its potential or actual relationship with Fidelity.<sup>4</sup> (R. 12, ¶ 17). Rather, Cushman issued an appraisal dated April 18, 2017 (the "Appraisal"), affirmatively representing and "certifying" that:

[W]e have no present or prospective interest in the property that is the subject of this report and no personal interest with respect to the parties involved;

We have no bias with respect to the property that is the subject of this report or to the parties involved.

(Id.). Cushman's representations were **false**.

(R. 12, ¶ 18, emphasis added).

After Cushman issued the Appraisal, Buffalo discovered that Fidelity retained Cushman for a

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<sup>4</sup> Fidelity conceded in its pleadings that there was an undisclosed national brokerage agreement with Cushman. See Motion to Dismiss, fn. 7.

national representation contract. (R. 13, ¶ 23).

Buffalo identified the previously undisclosed conflict of interest to Fidelity but Fidelity refused to retain another third party appraisal and instead demanded the Buffalo sell the Property at the Appraisal price of \$22.9 million and refused to extend the closing date of May 25, 2017. (R. 13, ¶ 24).

### **ARGUMENT**

#### **STANDARD OF REVIEW**

A motion to dismiss is reviewed “de novo, accepting as true all factual allegations in the complaint and favorable inferences drawn therefrom.” Lipsitt v. Plaud, 466 Mass 240, 241 (2013). An appellate court may consider exhibits attached to the complaint and items appearing in the record.” Id.

#### **I. BUFFALO ALLEGED AN ACTUAL CASE AND CONTROVERSY AND THEREFORE DISMISSAL WAS INAPPROPRIATE.**

By dismissing a claim for declaratory relief which alleged an actual controversy the superior court committed reversible error. See Connery v. Commissioner of Correction, 33 Mass. App. Ct. 253, 254, n. 4 (1992) (“Irrespective of the merits of the case, dismissal of the case under Mass. R. Civ. P. 12(b)(6) was not a correct disposition. In an action

for declaratory relief, even when the plaintiff is not entitled to the relief he seeks, the court ought to declare the rights of the parties.").

Under Massachusetts law, "in a properly brought action for declaratory relief there must be a declaration of the rights of the parties" even if relief is ultimately denied to the plaintiffs. Cherkes v. Town of Westport, 393 Mass. 9, 12 (1984); see also Attorney v. Kenco Optics, Inc., 369 Mass. 412 (1976) (when an action for declaratory relief is properly brought the action should not be dismissed but the court should declare the rights of the parties); Careone Management LLC v. Navisite, Inc., Civil Action No. 201400378, 2017 WL 4419004 (Mass. Super. April 24, 2017) ("Since [the plaintiff] has standing and there is an actual case and controversy between the parties regarding their rights and obligations under their contract, the Court is obligated to declare the rights of the parties rather than dismiss the claim."); Kirin Produce Co., Inc. v. Lun Fat Produce, Inc., Civil Action No. 1684 cv 03338 BLS2, 2017 WL 1654821 (Mass. Super. Feb 6, 2017) (concluding that where plaintiff had standing to assert the claim and there was an actual controversy

the "Court is obligated to declare rights of the parties").

In this case, Buffalo alleged an actual case or controversy. Motor Club of America Insurance Company v. All American Rental, Inc., 14 Mass.App.Ct. 1031 (1982) ("A motion to dismiss an action seeking declaratory relief for failure to state a claim normally raises only the questions whether a controversy has been alleged.").<sup>5</sup> Specifically, Buffalo alleged that

- o "[A]n actual case or controversy exists between Fidelity and Buffalo with respect to the validity of the Option Agreement and the definition of fair market value contained in the Option Agreement;" and
- o "[A]s a result of Cushman's failure to disclose its conflict of interest and false representation that there was no conflict the appraisal [should be declared] invalid."

(Ver. Comp. ¶¶ 26, 29).

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<sup>5</sup> Compare Harvard Crimson, Inc. v. President and Fellow of Harvard, 445 Mass. 745, fn 5 (2006), where the Court concluded that there was no case or controversy because the statute did not apply, and dismissed the case.



By the Order the Court acknowledged that Buffalo had alleged an actual case and controversy regarding the validity of the appraisal<sup>6</sup> but refused to declare the rights of the parties and instead dismissed the claims. By dismissing Buffalo's claims without declaring the parties' respective rights, the Court committed an error of law. *Smith & Zobel*, 7 Mass. Prac. Rules Practice § 57.2 ("A motion under Rule 12(b)(6) in a declaratory judgment action normally questions only whether the complaint alleges a controversy or if the case implicates one of the statutory reasons for refusing to enter declaratory relief.").

## **II. THE ALLEGED APPEARANCE OF BIAS IS SUFFICIENT TO STATE A CLAIM TO INVALIDATE THE APPRAISAL**

By imposing an "extremely high" fraud-like standard to invalidate an appraisal, the Court committed an error of law. By common law rule, a court will review an appraisal for "fraud, corruption, dishonesty or bad faith" or other irregularity with the contractually agreed-upon process. See Cambridge

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<sup>6</sup> The Order recognized that "[T]he Verified Complaint attacks the validity of the independent appraisal contending among other things that the entity that employed the individual appraiser did not disclose a prior business relationship that it had with Fidelity."

Street Metal Co., Inc. v. Corrao, 30 Mass. App. Ct. 150 155 (1991) ("It is clear to us that the contracting parties never intended to be bound by the decision of the appraiser regardless of how he reached his decision."); Eliot v. Coulter, 322 Mass. 86 (1947); Boulevard Associates v. Seltzer Partnership, 664 A.2d 983, 987 (Pa. Super. Ct. 1995) ("judicial review of appraisal is limited to fraud, misconduct, corruption or other irregularity causing an unjust result.").

A finding of actual bias, fraud or corruption is not required to invalidate an appraisal. Crow Construction v. Jeffrey M Brown Assoc., Inc., 264 F.Supp.2d 217, 223, 224 (E.D. Penn. 2003) (nondisclosure cases require only the demonstration of the appearance of bias); Joel Lewin Charles Shaub, Jr., Massachusetts Construction Laws, 57 Mass.Prac., Construction Law, 15:15 (2014); see also Matter of Arbitration Between Trans Chemical Ltd and China Nat. Machinery Import and Export, 978 F.Supp. 266, 303 (S.D. Tx 1997) ("Fraud requires a showing of bad faith during the arbitration proceedings, such as. . . **.undisclosed bias of an arbitrator...** ."). Rather, an appraiser's failure to disclose facts showing a

potential conflict of interest that "might give the impression of possible bias" is sufficient to justify invalidation, modification or other appropriate legal or equitable remedy, even if no actual or fraud bias is present. See Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co., 466 N.W.2d 257, 262 (Iowa 1991) ("The appointment of an appraiser with a concealed pecuniary interest in the outcome is a sufficient ground for voiding the award as a matter of law without a showing of prejudice"); Gebers v. State Farm Gen. Ins. Co., 38 Cal. App. 4th 1648, 1652 (1995) (holding appraiser was not "disinterested" where appraiser "was currently retained by State Farm as an expert witness in two pending court actions" constituting "a direct pecuniary interest which casts considerable doubt on the appraiser's ability to act impartially" and failed to disclose his relationship with State Farm to the Plaintiffs).

In a factually similar case, Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), the plaintiff challenged an arbitration award based upon an undisclosed business relationship between an arbitrator and the other party to the arbitration. The Supreme Court vacated the

arbitration award based upon the “appearance of bias.” The Court recognized that to invalidate an award, no actual fraud or bias must be demonstrated. Id. at 147-148. Rather, the Court confirmed that the nondisclosure of facts showing a “potential conflict” of interest creates an appearance of bias sufficient to vacate the award. Id. at 149. Specifically the Court concluded that:

It is true that arbitrators cannot sever all their ties with the business world since they are not expected to get all their income from their work deciding cases but we should if anything be even more scrupulous to safeguard the impartiality of arbitrators than judges since the former have complete free rein to decide the law as well as the facts are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

(emphasis added).

Here, the appraisal (like the arbitration in Commonwealth Coatings) is nothing more than a contractually agreed-upon non-judicial method for resolving valuation disputes. See State Room, Inc. v.

MA-60 State Associates, LLC, 84 Mass. App. Ct. 244, 249 (2013) (“An appraisal process is an agreed reference to a third party. . . most typically for a determination of value.”). Similar to the arbitration in Commonwealth Coatings, the same concerns of preserving the integrity of the process by requiring disclosure of any conflicts are applicable to an appraisal. Indeed, like the appraiser<sup>7</sup> in this case, the arbitrator in Commonwealth Coatings, was bound by rule to disclose “any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial arbitrator.” And the failure to disclose by the arbitrator in Commonwealth Coatings (like the failure of the appraiser in this case) tainted the integrity of the process. Thus, like Commonwealth Coatings, the allegations of nondisclosure and intentional concealment should have been sufficient to declare the appraisal invalid.

The Order however neither considered nor applied the “appearance of bias” standard adopted in

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<sup>7</sup> The Appraiser was bound by the Appraisal Agreement and the ethical obligations requiring disclosure of conflict before providing an services. The Appraiser was also bound my statute to provide unbiased services. See M.G.L.c. 112, § 191 (requiring that an appraiser to be “disinterested” and “unbiased”).

Commonwealth Coatings to determine the validity of the appraisal. Nor did the Court justify its radical departure from the "appearance of bias" standard in Commonwealth Coatings to impose an "extremely high" fraud-like standard. Under this "extremely high" standard, "nondisclosure" and intentional concealment are insufficient as a matter of law to invalidate an appraisal. Indeed, absent from the Order is either citation to Commonwealth Coatings or any effort to distinguish the claims in this case from Commonwealth Coatings to justify the "extremely high" standard imposed.

Moreover, the Court never attempted to reconcile its extremely high fraud-like standard, insulating from judicial review claims of bias with the Supreme Court's effort in Commonwealth Coatings to protect the integrity of alternative dispute resolution procedures by eliminating "even the appearance of bias." By adopting an appearance of bias standard, the Supreme Court recognized that:

The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is a voluntary compliance with the decree without need for judicial enforcement. This end is best served by establishing an

atmosphere of frankness at the outset through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties. In many cases the arbitrator might believe the business relationship to be insubstantial that to make a point of revealing it would suggest he is indeed easily swayed and perhaps a partisan of that party. But if the law requires the disclosure no such imputation can arise. And it is far better that the relationship be disclosed at the outset when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity than to have the relationship come to light after the arbitration when a suspicious or disgruntled party can seize on it as a pretext for invaliding the award.

Commonwealth Coatings, 393 U.S. at 151. But the fraud-like standard applied by the Court discourages disclosure and protects silence and collusion. The Order effectively authorized the parties to submit disputes to appraisers that may be biased against one party and favorable to another and deprived them of any judicial recourse.

Absent from the Order are any cases to support the "extremely high" fraud-like standard suggested by the Court. The only justification offered by the

Court for the “higher standard” is the expressed “desire” by the parties to the appraisal “for finality.” But the application of the appearance of bias rule does not in any way impact the effectiveness of the appraisal process or the finality of the appraisal. To the contrary, the appearance of bias standard and the mandated disclosure only enhances the appraisal process by eliminating any post-appraisal challenges based upon bias by requiring pre-appraisal disclosures.

**III. THE ALLEGED FAILURE TO DISCLOSE AND KNOWING CONCEALMENT OF A CONFLICT OF INTEREST IS SUFFICIENT AS A MATTER OF LAW TO INVALIDATE THE APPRAISAL.**

Regardless of the standard of judicial review Buffalo has alleged sufficient facts to invalidate the appraisal. Specifically, Buffalo has alleged that:

- by contract Cushman, Fidelity and Buffalo agreed to an impartial, unbiased independent appraisal process (Ver. Comp. at ¶¶ 13-15, 27 );
- this appraisal process required Cushman to investigate and disclose any “direct or indirect” “current or prospective” conflicts of interest; (Id.);



- Cushman failed to disclose its business relationship with Fidelity and falsely certified that there was no conflict (Ver. Comp. ¶ 28); and
- Buffalo relied upon Cushman's the affirmatively false certification (that there was no conflict) and the material omission by Cushman (i.e. its failure to disclose its relationship with Fidelity) and authorized Cushman to complete the appraisal. (Id.)

These facts are sufficient to allege the appearance of bias and actual fraud. See generally Delta Mine Holding Co. v. AFC Coal Properties, Inc., 280 F.3d 815, 821-22 (8th Cir. 2001) ("When a neutral arbitrator fails to disclose a relationship with one party that casts significant doubt on the arbitrators impartiality" "it is appropriate to assume that the concealed partiality prejudicially tainted the award.").

**IV. BUFFALO HAS ALLEGED SUFFICIENT FACTS TO SUPPORT ITS CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.**

By its conduct, Fidelity tainted the appraisal process and breached the covenant of good faith and fair dealing. The covenant of good faith and fair dealing is implied in every contract. See In re 201

Forest Street, LLC, 409 B.R. 543, 591 (Bank. D. Mass. 2009). The purpose of the implied covenant is to ensure that neither party interferes with the ability of the other to enjoy the fruits of the contract and that the parties 'remain faithful to the intended and agreed expectations of the contract. See Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 385 (2004). A breach occurs when one party violates the reasonable expectations of the other by destroying or injuring the right of the other party to receive the benefits under the contract. See Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. 451, 471-73 (1991).

Here, Buffalo has alleged that Fidelity's conduct tainted the appraisal process and deprived it of the benefit of its bargain. Specifically, Buffalo has alleged that Fidelity knew of the potential conflict of interest with Cushman, knew that the agreed-upon appraisal process was therefore tainted by bias and attempted to take unfair advantage by demanding that Buffalo sell the Property based upon the bias appraisal. See Ver. Comp. ¶35-38. The Order fails to even reference the claim for breach of the covenant of good faith and fair dealing nor did it provide any

basis to dismiss the claim as alleged. As a result,  
the dismissal was an error of law.

**CONCLUSION**

WHEREFORE, Buffalo requests that the Court vacate  
the dismissal and remand the case to the Superior  
Court to be determined on its merits.

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**Certificate of Compliance**  
**PURSUANT TO MASS.R. APP.P. 16(K)**

I hereby certify that the brief complies with  
rules of court that pertain to the filings of briefs  
including but not limited to Mass.R.A.P. 16(a)(6)  
(pertinent findings or memorandum of decision);  
Mass.R.A.P. 16 (e) (references to the record);  
Mass.R.A.P. 16(f) (reproduction of statutes, rules,  
regulations); Mass.R.A.P. 16 (h) (lengths of briefs);  
and Mass.R.A.P. 20 (form of briefs, appendices and  
other papers).

Dated: October 26, 2017

/s/Richard Briansky  
Richard Briansky

**CERTIFICATE OF SERVICE**

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on this date of October 27, 2017 I have made service of a copy of the following documents:

1. Brief of the Plaintiff-Appellant Buffalo-Water 1, LLC; and
2. Appendix to the Brief of the Plaintiff-Appellant Buffalo-Water 1, LLC

upon the attorney or record for each party by e-mail to the following persons:

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**Dated: October 27, 2017**

**ADDENDUM**

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**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**SUPERIOR COURT  
SUCV2017-1584-BLS 2**

**BUFFALO WATER 1, LLC  
Plaintiff**

**vs.**

**FIDELITY REAL ESTATE COMPANY, LLC  
Defendant**

**MEMORANDUM OF DECISION AND ORDER  
ON DEFENDANT'S MOTION TO DISMISS**

This is an action challenging an independent appraisal of property as provided by an agreement between the parties, two sophisticated entities with experience in owning and leasing real estate. The plaintiff, Buffalo Water 1, LLC (Buffalo) is the owner of the property, located at 7 Water Street in downtown Boston (the Property). The defendant Fidelity Real Estate Company LLC (Fidelity) occupied the Property under a long term lease with an option to purchase the property in the final year of the lease as set forth in an Option Agreement. The Option Agreement sets the purchase price at 95 percent of the "fair market value" (FMV) or \$16,275,000, whichever is greater. If the parties could not agree upon the FMV, the Option Agreement set forth the specific appraisal process that the parties were to follow. Fidelity timely exercised its option to purchase and, with the parties unable to agree to the FMV, complied with the appraisal process, which included an independent appraisal. The Verified Complaint attacks the validity of the independent appraisal, contending among other things that the entity that employed the individual appraiser did not disclose a prior business relationship that it had with Fidelity.

The case is now before the Court on Fidelity's Motion to Dismiss. In support, it relies on the Massachusetts common law rule that severely limits the scope of judicial review regarding appraisals contractually authorized by the parties. Pursuant to that rule, the Court may invalidate an appraisal only where the appraiser plainly exceeded the scope of his authority or where the appraisal was the result of "fraud, corruption, dishonesty or bad faith." Nelson v. Maiorana, 395 Mass. 87, 89 (1985), citing Eliot v. Coulter, 322 Mass. 86, 91 (1947). "The premise of the rule of restricted reviewability is that the contracting parties' assignment of a valuation to an appraisal embodies their shared desire for finality." State Room, Inc. v. MA-60 State Assoc., LCC, 84 Mass.App.Ct. 244 249 (2013). Applying that rule to the allegations in the Verified Complaint, this Court agrees with the defendant that the Complaint fails to state a claim upon which relief may be granted. Rule 12(b)(6), Mass.R.Civ. P.

The independent appraisal was performed by Robert Skinner. Skinner worked for Cushman & Wakefield (Cushman), which was selected in compliance with the terms of the Option Agreement. The Engagement Letter pursuant to which Cushman was hired stated that the appraisal would be performed in accordance with certain standards, including the Code of Ethics of the Appraisal Institute. That Code of Ethics (an Exhibit to the Verified Complaint) states: "It is unethical to provide a Service if a valuer has any direct or indirect, current or prospective personal interest in the subject or outcome of the service or with respect to the parties involved in the Service, unless...such personal interest is disclosed to the client prior to the valuer agreeing to provide the Service." The Engagement Letter represented that the "undersigned appraiser has not provided prior services" within the preceding three years.

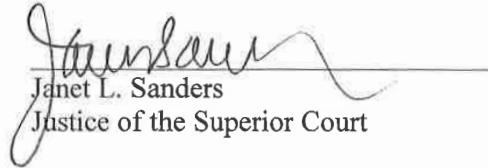
The Verified Complaint states that Cushman had a "national representation" contract with Fidelity in December 2016. The Complaint provides no further details about this. There is



no allegation that Skinner was involved in this alleged contract in any way. Nevertheless, the Complaint alleges, in conclusory fashion, that Cushman's failure to disclose this contract to the plaintiff was a "conflict of interest," in violation of the terms of the Engagement Letter and in violation of the Code of Ethics. It is far from clear that the nondisclosure alleged in the Verified Complaint violates any ethical or contractual obligation of Cushman, much less of Skinner. Even if it did, however, this does not amount to the kind of bad faith, fraud or corruption required for a court to invalidate an independent appraisal agreed to by the parties.

Like the defendants, this Court has not been able to locate any Massachusetts case in which a plaintiff has been successful in invalidating an appraisal. That is because the bar is extremely high. Indeed, courts have analogized this standard to the parallel statutory provision that restricts review of arbitration awards. See State Room, 84 Mass.App.Ct. at 249 n. 9. Under that standard, the SJC has made it clear that a court should not vacate an arbitration award absent conduct that is "underhanded, conniving or unlawful [conduct] similar to corruption or fraud." Katz Nannis & Solomon P.C. v. Levine, 473 Mass. 784, 796-796 (2016). This high standard makes sense when one considers the purpose of restricting judicial review in this circumstances. Having agreed to an appraisal process in their contract, the parties have expressed their desire for finality. This objective would be undermined if a plaintiff was permitted to keep two strings in its bow – that is, move forward with the appraisal and then, if dissatisfied with the result, seek to overturn the appraisal with only vague allegations of bias. See JCI Commun., Inc. v. IBEW 103, 324 F.3d, 42 52 (1<sup>st</sup> Cir. 2003). (discussing purpose behind judicial review of arbitration awards).

For all the foregoing reasons and for other reasons stated in defendant's thorough memorandum in support of the motion, the Motion to Dismiss is ALLOWED and the Complaint is hereby DISMISSED.

  
Janet L. Sanders  
Justice of the Superior Court

Dated: July 21, 2017